IN THE

Supreme Court of the United States

October Term, 1976

No. 76-496

BENSON A. WOLMAN, FREDRICK CHAMBERS, PATRICIA J. KEENAN, BARBARA KAYE BESSER, NANCY R. TERJESEN, and MARJORIE WRIGHT,

Appellants,

v.

MARTIN W. ESSEX, Superintendent of Public Instruction of the State of Ohio; STATE BOARD OF EDUCATION; GERTRUDE W. DONAHEY, Treasurer of the State of Ohio; THOMAS E. FERGUSON, Auditor of the State of Ohio; BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF COLUMBUS, OHIO; HANNA FEIGENBAUM, JAMES GRIT, EWALD KANE and HELEN S. KOLOSKI,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio Eastern Division

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for National Coalition for Public Education and Religious Liberty, respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of appellants' claim that an Ohio statute providing various forms of aid to religiously affiliated elementary and secondary schools violates the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

Appellants have consented to the filing of this brief. Counsel for appellees have not responded to our request for consent.

The interest of the *amicus* and the names of the constituent organizations for which it speaks in filing this motion are set forth in the attached brief. Each of those constituents and the National Coalition believe that the statute challenged here is but one of a series of measures designed to evade the strictures of the No-Establishment Clause with respect to government aid to religious educational institutions. Furthermore, the National Coalition is party to an action now pending in the Southern District of New York challenging the constitutionality of practices taking place under the Federal Elementary and Secondary Education Act of 1965 which in some respects parallel practices challenged in this case. *National Coalition for Public Education and Religious Liberty, et al.* v. *F. David Mathews, et al.*, 76 Civ. 888 (CHT). We believe that our experience in dealing with this issue will enable us to contribute to the resolution by this Court of the important constitutional issue pending before it and accordingly submit this motion.

Respectfully submitted,

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BRIEF OF NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY *AMICUS CURIAE*

Interest of the *Amici*

The National Coalition for Public Education and Religious Liberty is, as its name indicates, an unincorporated association of national, state and local organizations committed to the protection and preservation of both public

education and religious liberty. It submits this brief *amicus curiae* in behalf of the following of its constitutent organizations:

American Association of School Administrators;

American Ethical Union;

American Humanist Association;

American Jewish Congress;

Americans United for Separation of Church and State;

Baptist Joint Committee on Public Affairs;

Board of Church and Society of the United Methodist Church;

Central Conference of American Rabbis;

Illinois Committee for Public Education and Religious Liberty (PEARL);

Missouri Baptist Christian Life Commission;

Missouri PEARL;

New York PEARL;

Monroe County, New York PEARL;

Nassau-Suffolk PEARL;

Michigan Council Against Parochiaid;

National Association of Laity;

National Council of Jewish Women;

National Education Association;

National Women's Conference, American Ethical Union;

Preserve Our Public Schools;

Public Funds for Public Schools of New Jersey;

New York State United Teachers;

Ohio Free Schools Association;

Union of American Hebrew Congregations;

Unitarian Universalist Association.

We believe that the statute whose constitutionality is presented in this case represents a serious threat to the integrity of both public education and religious liberty. We regard the dual principle of religious liberty and separation of church and state as fundamental to American democracy. We deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms which that wall was intended to protect.

Furthermore, we regard our free non-sectarian public school system as one of the most precious products of our American democracy and a unique contribution to modern civilization. We believe that the success of our free public school system is based in substantial part upon maintenance of separation of church and state and that acceptance of the theory that religious educational institutions may compete for tax-raised funds with the public school system not only violates the Constitution but in the long run tends to destroy public education. We believe that the same constitutional provisions which protect the institutional integrity of religious schools against governmental interference protect public schools from competition by religious schools in the allocation of funds raised by taxation for public education. We therefore express our opposition whenever at-

tempts are made to compromise the principle of separation of church and state or the integrity of our public school system.

Statute Involved

The text of the statute challenged in this suit, Ohio Revised Code Section 3317.06, signed into law on August 29, 1975, is set forth in full on pp. A36-A40 of the Jurisdictional Statement in this appeal and a summary and explanation of the statute is set forth on pp. 4-8 of the Jurisdictional Statement. Accordingly they need not be repeated here.

The Question to Which This Brief Is Addressed

The questions presented in this appeal are set forth on pp. 8-10 of the Jurisdictional Statement. The single question to which this brief is addressed is whether a statute providing tax-raised funds to support the educational programs of parochial schools beyond transportation and the loan of secular textbooks violates the Establishment Clause of the First Amendment as made applicable to the States by the Fourteenth.

Statement of the Case

The statement of the case is set forth on pp. 10-12 of the Jurisdictional Statement and need not be repeated here.

Summary of Argument

The decisions of this Court have made it clear that educational services in religious schools may not be financed in whole or in part by tax-raised funds beyond the provision of transportation for the pupils and the lending of secular textbooks for use by the pupils of these schools. The statute challenged in this suit is another of the many instances of efforts by state legislatures to evade these decisions and the principles upon which they are founded. Preservation of the jurisdiction of this Court, the principle of judicial review and the integrity of the Establishment Clause of the First Amendment all require reversal of the decision of the court below and the invalidation of the challenged statute to the extent that it provides for public financing of educational services in religious schools beyond transportation and the loan of secular textbooks.

ARGUMENT

To the extent that the challenged statute provides for state financing of educational services in religious schools beyond transportation and the loan of secular textbooks, it violates the Establishment Clause of the First Amendment as construed and applied in the decisions of this Court.

The Constitution, by its own terms (Article VI), is the supreme law of the land and every state, by voluntarily becoming part of the Union and thus accepting the Constitution, accepts too its supremacy. Ever since *Marbury* v. *Madison*, 1 Cr. (5 U.S.) 137 (1803), it has been recognized that the ultimate responsibility for interpreting the Con-

stitution and determining conclusively whether a particular statute, state no less than federal, is consistent with the Constitution, rests with the courts and ultimately with the Supreme Court of the United States.

Those who wrote our Constitution recognized that its terms or their judicial interpretation might not always be acceptable to the people of the nation. Accordingly, they provided in Article V a procedure to alter its terms, a procedure which from the Eleventh Amendment on has most often been used for the purpose of nullifying in whole or in part unacceptable decisions of this Court.[1] What those who wrote our Constitution perhaps did not anticipate but certainly did not or would not countenance was evasion of its prohibitions through ingenious devices, simple or sophisticated.

For many years the history of the Equal Protection Clause of the Fourteenth Amendment was in large measure a chronicle of state efforts, legislative, executive and judicial, to vitiate the protection it sought to provide for racially disadvantaged Americans. These were undertaken because it was quite obvious that the American people were not prepared to turn the clock back and eliminate the Clause from the Constitution or nullify the Court's interpretation of its meeting.

Closer to the situation presented in the instant case has been the history of the Court's decisions in *Engel* v.

1. *E.g.*, Thirteenth and Fourteenth Amendments nullifying *Dred Scott* v. *Sanford*, 19 How. (60 U.S.) 393 (1857); Sixteenth Amendment nullifying *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895); Twenty-sixth Amendment overruling, in part, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

Vitale, 307 U.S. 421 (1962), and *Abington School District* v. *Schempp*, 370 U.S. 203 (1963). During the decade and a half since these decisions outlawed state-sponsored prayer and devotional Bible reading in the public schools, determined efforts have been made to overrule them through constitutional amendment.[2] These efforts, dating almost from the day after *Engel* was decided, having all failed and the prospects of success for any future attempts along this line being obviously extremely dim, efforts turned towards *de facto* nullification in the form of attempted evasions. Some were simple, some more sophisticated, but all were alike in having the purpose of nullification and in uniformly failing in the courts, including this Court.[3]

This Court's decisions limiting governmental aid to parochial schools to transportation and the loan of secular textbooks have experienced a substantially parallel history. The protagonists of aid to parochial schools recognize that the chances of amending the Constitution to overcome the Court's decisions in this area are so small as to be negligible. Hence, unlike the case of the prayer and Bible reading decisions, no such effort has been made. (Ten proposals

2. See Hearings before the Committee on the Judiciary, House of Representatives, 88th Congress, Second Session, on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools.

3. See, *e.g.*, *De Kalb School District* v. *DeSpain*, 255 F. Supp. 655, affirmed 384 F. 2d 836, certiorari denied, 390 U.S. 906 (1968) ("cookie prayer" from which the word "God" was eliminated); *Stein* v. *Oshinsky*, 224 F. Supp. 757, affirmed 348 F. 2d 999, certiorari denied, 382 U.S. 957 (1965) (parents' suit to compel school to permit pupil-initiated prayer); *State Commission of Education* v. *School Committee*, 358 Mass. 776, certiorari denied, 401 U.S. 929 (1971) (pupil-initiated prayer permitted by school authorities); *Board of Education of Netcong* v. *State Board of Education*, 108 N.J. Super. 564, affirmed, 57 N.J. 172, certiorari denied, 401 U.S. 1013 (1971) (prayer read from Congressional Record).

to amend state constitutions have been presented to the voters for determination at the ballot box. Nine were defeated; one succeeded, and that one, in Michigan, unlike all the others, strengthened rather than weakened the ban on aid to parochial schools.)[4] This fact has not deterred the legislatures in a number of states, notably New York, Pennsylvania and, of course, Ohio, among others, in the search to overcome the Establishment Clause, which they deem a foe to be evaded and outwitted by whatever stratagem may prove effective. If purchase of services won't work,[5] try tuition reimbursement. If that won't work,[6] try tax deductions and credits.[7] If they prove unsuccessful, perhaps payment for auxiliary services may get through.[8] If that won't work, go back to the drawing boards and come up with something new. What we are witnessing is a sort of historic game of chess played between ingenious lawyers and legislators on one side and this Court on the other side of the chessboard of the Establishment Clause, with each move by the former checked by the latter, but the game continuing in the hope that a successful move will ultimately be found.

The generation that wrote the Establishment Clause into the Constitution did not view it as an enemy of the people. On the contrary, they deemed it the surest and

4. New York (1967); Michigan (1970); Nebraska (1970); Oregon (1972); Idaho (1972); Maryland (1972); Maryland (1974); Washington (1975); Missouri (1976); Alaska (1976).

5. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

6. *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

7. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

8. *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

most effective protector of religious freedom, and expected that its spirit as well as its letter would be honored by future generations. Above all, they intended to bar just the type of legislation involved in the present litigation.

With the exception of *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1948), which upheld respectively the constitutionality of transportation and textbook aid to church schools, the decisions of this Court, at least as far as elementary and secondary schools are concerned, have consistently rejected every legislative effort to channel tax-raised funds to church schools, directly or indirectly, as violative of the Establishment Clause.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the Court invalidated a purchase-of-services statute financed out of the proceeds of horseracing.

In *Sanders* v. *Johnson*, 403 U.S. 955 (1971), it affirmed without opinion a district court decision (319 F. Supp. 421) holding unconstitutional a purchase-of-services statute financed out of the general treasury.

In *Early* v. *DiCenso*, 403 U.S. 602 (1971), it held unconstitutional a salary supplement law.

In *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), it ruled invalid a statute providing tuition payments for low-income families.

In *Sloan* v. *Lemon*, 413 U.S. 825 (1973), it invalidated a tuition reimbursement law.

In *Essex* v. *Wolman,* 409 U.S. 808 (1973), it affirmed without opinion a district court decision (342 F. Supp. 399) ruling unconstitutional a general tuition grants law.

In *Nyquist, supra,* it struck down a law providing tax benefits for parents whose children attend parochial schools.

In the same decision, it held unconstitutional statutory maintenance and repair grants to parochial schools.

In *Grit* v. *Wolman,* 413 U.S. 901 (1973), it affirmed without opinion a District Court decision (353 F. Supp. 744) barring tax credits for parents of parochial school pupils.

In *Levitt* v. *Committee for Public Education and Religious Liberty,* 413 U.S. 472 (1973), it nullified statutory grants to pay for law-mandated services performed in parochial schools.

In *Brusca* v. *State Board of Education,* 405 U.S. 1050 (1972), it affirmed a decision (332 F. Supp. 275) holding that exclusion of parochial schools from tax-funding of education did not violate any constitutional rights of parents sending their children to such schools.

In *Franchise Tax Board* v. *United Americans for Public Schools,* 419 U.S. 890 (1974), it affirmed a District Court decision invalidating a statute providing tax reductions for parents of parochial school pupils.

In *Luetkemeyer* v. *Kaufmann,* 419 U.S. 888 (1974), it affirmed a District Court decision (364 F. Supp. 376) upholding a Missouri law limiting free transportation to pupils attending public schools.

In *Marburger* v. *Public Funds for Public Schools,* 417 U.S. 961 (1974), it affirmed a District Court decision (358 F. Supp. 29) holding unconstitutional on its face a New Jersey statute providing auxiliary services, textbooks, instructional materials and instructional equipment to private and parochial schools.

In *Meek* v. *Pittinger,* 421 U.S. 349 (1975), it invalidated, except in respect to the loan of textbooks, a statute which, like the statute invalidated in *Marburger* and the Ohio statute which was the predecessor of the one now before the Court, provided for a variety of so-called auxiliary services "and such other secular, neutral and non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth."

Finally, in *Wolman* v. *Essex,* 421 U.S. 982 (1975), the Court, on authority of *Marburger,* reversed and remanded a District Court decision (342 F. Supp. 399) upholding the constitutionality of the predecessor of the present statute, whereupon the District Court determined that it was not constitutionally distinguishable from the statute in *Meek* and adjudged it unconstitutional.

Meek was decided on May 19, 1975; *Wolman* v. *Essex* on May 27, 1975. Three months later, the bill involved in the present case was signed into law.

These are not the only instances of legislative efforts to evade the decisions of this Court in applying the Establishment Clause to laws giving financial aid to religious schools. Indeed, on the same day that the Court decided

Lemon v. *Kurtzman* and *Earley* v. *DiCenso*, the governor of the State of New York signed into law a bill providing services which the United States District Court for the Southern District of New York shortly thereafter found indistinguishable from the statutes invalidated in *Lemon* and *Earley*.[9] Other instances might be cited, but what is remarkable about all of them is that in the short four years between *Lemon* and *Meek* so many different efforts in so many different states should be made to evade or nullify the decisions of this Court forbidding aid to parochial schools on the elementary and secondary school levels. What is not remarkable but highly encouraging to those committed to preservation of the principle of separation of church and state and the integrity of public education is that in each case, without exception, the effort has failed, either by rejection on the part of the people when presented to them in the form of a proposed constitutional amendment or by this Court after legislative enactment without benefit of recourse to the expressed will of the people.

Perhaps the starkest illustration of the change-in-form-but-not-in-substance patterns in the present case is the instructional materials provision in the challenged statute. In *Meek*, the Court held unconstitutional a Pennsylvania statute which, like the predecessor of the present Ohio law, provided for loans directly to nonpublic schools of "instructional materials and equipment, useful to the education" of nonpublic school children. The instructional materials included periodicals, photographs, maps, charts, recordings

9. *Committee for Public Education and Religious Liberty* v. *Levitt*, U.S.D.C. S.D.N.Y. No. 3218/1971. The District Court's decision, issued January 11, 1972 is unreported.

and films. The instructional equipment included projectors, recorders and laboratory paraphernalia.

The corresponding provision in the present Ohio statute is described by the District Court in the present case as follows (Jurisdictional Statement p. A12):

> Section 3317.06 (B) and (C) O.R.C. authorizes the local school districts to purchase and lend to nonpublic school pupils or to their parents instructional materials and equipment that are incapable of diversion to religious use, and to hire clerical personnel to administer the program. Examples of equipment supplied in the past under predecessor statutes include weather forecasting charts, lunar terrain models, fossil collections, and metric system materials. The statute further provides that the materials and equipment lent pursuant to the statute may be stored on the premises of the nonpublic school and the clerical personnel hired to administer the lending program may perform their duties upon the premises of the nonpublic school when necessary.
>
> The duties of the clerical personnel hired to administer the lending program includes: distribution of loan request forms and receipt of requests, maintenance of inventory, collection and distribution of materials and equipment, maintenance of custody and storage and other duties necessary for the efficient implementation of the program.

Even a cursory comparison of the Pennsylvania statute and its counterpart, the previous Ohio statute, on the one hand and the present statute on the other shows clearly that the only difference between them is that in the former the loan is stated to be to the nonpublic schools whereas in the present one it is to the pupils in those schools.

With all due respect, this provision borders on the absurd. It is simply beyond the realm of reality to accept the transactions authorized by the statute as loans to the children or their parents. It is safe to assume that, if the children and parents are borrowers, they are unconsciously so. One must stretch his imagination to an unusual degree to envision school pupils as borrowers of weather forecasting charts, lunar terrain models, fossil collections and metric system materials. Judicial acceptance of this transparent fiction, we respectfully suggest, would make of the Bill of Rights what Madison called a "parchment barrier." If the Establishment Clause can be so easily and effectively pierced, so too can every other guaranty in the Bill of Rights.

In respect to instructional materials and equipment, the Ohio legislature paid lip service (though no more) to what this Court has ruled in previous cases. In respect to testing and scoring services it did not even trouble to do that. Section 3317.06(J) O.R.C. authorizes the local school districts throughout the State of Ohio to supply for use by nonpublic schoolchildren within the district such standardized tests and scoring services as are in use in the public schools of the state. Such tests, according to the stipulations of the parties in the present suit, are used to measure the progress of all students in secular subjects.

Like the statute in issue in this case, the Pennsylvania law involved in *Meek* provided for testing services in religious schools. So too did the New Jersey statute invalidated in *Marburger*. In neither case was any distinction made in the Court's decision in respect to tests prepared

by teachers or other religious school personnel and standardized tests provided by state authorities. In both cases, the respective statutes were held unconstitutional.

This fact was recognized by the United States District Court for the Southern District of New York in the case of *Committee for Public Education and Religious Liberty* v. *Levitt*, 414 F. Supp. 1174 (1975). There, too, the Court was called upon to pass upon a statute enacted after this Court's decision in *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973). Like the statute here in issue, the New York statute sought to limit public financing of testing and scoring services to tests which were used in the public schools of the state. Reaching a conclusion directly contrary to that reached by the court below in the present case, the District Court in the Southern District of New York held that whatever ambiguity might be read into this Court's decision in *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973), was eliminated by its decisions in *Marburger* and *Meek*. Accordingly, it unanimously ruled the New York law violative of the Establishment Clause.

We add only that we find it difficult to see how it could have decided otherwise. Aside from this Court's decisions in *Marburger* and *Meek*, its decision in *Nyquist* impelled the same result. There the Court struck down statutory maintenance and repair grants to parochial schools, including the cost of heat, light, painting and sanitation services, services which are clearly at least as "secular, neutral and nonideological" as testing even through state-prepared tests.

The fundamental point of all the decisions we have cited in this brief is that schooling is an indivisible unit not subject to artificial dissections that serve no purpose other than as efforts, fruitless so far, to evade the proscription of the Establishment Clause in respect to schooling in religious schools. The inescapable conclusion of these decisions is that preservation of the jurisdiction of this Court, the principle of judicial review and the integrity of the Establishment Clause all require reversal of the decision of the court below and the invalidation of the challenged statute to the extent that it seeks to provide for public financing of educational services in religious schools beyond transportation and the loan of secular textbooks.

Conclusion

For the foregoing reasons, the judgment of the District Court should be reversed and the challenged statute should be declared unconstitutional.

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